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In the

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,
Petitioner

vs.

CPC INTERNATIONAL, INC., et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS AEROJET-GENERAL CORPORATION, CORDOVA CHEMICAL COMPANY OF MICHIGAN AND CORDOVA CHEMICAL COMPANY

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RULE 29.6 STATEMENT

The parent company of Cordova Chemical Company of Michigan is Cordova Chemical Company. The parent company of Cordova Chemical Company is Aerojet-General Corporation. The parent company of Aerojet-General Corporation is GenCorp, a publicly traded company. The filing parties do not have non-wholly-owned subsidiaries, but Aerojet-General Corporation does hold less than 1% of the stock of Megabar Explosives Corp., a Utah corporation.

STATEMENT OF THE CASE

Introduction

Aerojet-General Corporation is in a unique position. All parties acknowledge that it never owned the contaminated site at issue in this case. More importantly, all parties acknowledge that neither Aerojet nor its subsidiaries contributed new contamination to the site. Because a key purpose of CERCLA is to impose the costs of remediation on the parties that caused the pollution, as the government repeatedly urges, Aerojet should not be liable. Holding an innocent party responsible for pollution caused by unrelated third parties undermines the very purpose the government says it wants to vindicate in this case.

The outcome in this case that would vindicate the statutory purpose of CERCLA and that would also be faithful to the statutory text is the one Aerojet has urged since the inception of this litigation. CPC International should be liable under Section 107(a)(2), not because it participated in managing its subsidiary, but because it directly operated facilities at a time those facilities were polluting the site owned by CPC's subsidiary. In contrast, Aerojet should not be liable under Section 107(a)(2) because it did not operate facilities at a time of any polluting activities at the site. The outcome Aerojet urges avoids the errors inherent in the more extreme positions advocated by the government, on the one hand, and by CPC, on the other hand.

By attempting to capture Aerojet, as well as CPC, in its liability net, the government has ignored the very statutory purpose it says it wants to vindicate, and it has improperly isolated one phrase in the full statutory text. To impose liability under Section 107(a)(2) regardless of whether new polluting activity occurred during the company's tenure at the site would ignore the statutory text limiting liability under the Section to persons who owned or operated facilities "at the time of disposal" of pollutants at the site. Because all of the pollution at the site was disposed of before Aerojet and its subsidiaries

had any connection with the site, liability under Section 107(a)(2) cannot apply to Aerojet.

CPC goes to a different extreme in its effort to escape liability. Despite the pollution that occurred while CPC was participating in environmental policy-making and day-to-day operations at its subsidiary's site, CPC argues that it cannot be liable because the overall corporate relationship between CPC and its subsidiary did not warrant veil-piercing under state corporate law. This extreme position improperly equates principles of state corporate law with the limits of liability under a federal statute. State corporate law properly controls the derivative liability of a corporation for the acts of its subsidiary, but that law does not define the direct liability of the corporation created by the statutory text itself.

Direct liability under Section 107(a)(2) turns not on derivative liability springing from the overall relationship between two particular corporations but on what the allegedly liable person itself did at the time of waste disposal at the "facility" owned or operated by the allegedly liable person. CPC is properly liable under this section because, as the district court found as a matter of fact, CPC involved itself in both "major decision-making and day-to-day operations" at its subsidiary's site. (Pet. App. 111a.) Indeed, CPC's own director of governmental and environmental affairs directly assisted Ott in delaying proposed solutions to Ott's polluting activity. (*Id.* at 74a-76a.) This level of activity goes beyond the "participation and control" test proposed by the government and rejected by the Court of Appeals, and properly subjects CPC to direct statutory liability.

Nature and Summary of the Case

This case involves responsibility for pollution caused by prior owners and operators of a site now owned by Cordova Chemical Company of Michigan ("Cordova/Michigan"). Aerojet-General Corporation ("Aerojet"), Cordova Chemical Company

("Cordova/California") and Cordova/Michigan (collectively the "Cordova Parties") have not caused or contributed to any contamination at the site. To the contrary, prior owners and operators deposited all of the contaminants in the soil and groundwater at the site before any of the Cordova Parties had anything to do with the site. Aerojet has never even owned or conducted operations at the site.

No Cordova Party had any contact with the site until 1977. By that time, the plume of contaminants had already spread off-site to a nearby creek and stabilized. Cordova/California, Aerojet's fully capitalized subsidiary, purchased the site from a federal bankruptcy trustee under a Stipulation and Consent Order with the State of Michigan. In the Stipulation and Consent Order, the State of Michigan promised that Cordova/California would never have any liability for the pollution left by previous owners of the site. Cordova/California would not have purchased the site without this promise from the State of Michigan.

Despite the promise of the State of Michigan, and despite the absence of any additional pollution at the site during the Cordova Parties' tenure at the site, the Cordova Parties now face a multi-million-dollar liability for remediation of pollution caused by a former subsidiary of CPC International ("CPC") and other unrelated parties. Both fundamental fairness and a proper application of state and federal law require that parties other than the Cordova Parties bear the costs of cleaning up pollution that the Cordova Parties did not create.

Facts

I. THE CORDOVA PARTIES DID NOT CONTRIBUTE TO CONTAMINATION AT THE SITE.

None of the Cordova Parties has ever disposed of hazardous substances or otherwise contributed to contamination at the site. This is the unrebutted testimony of state and federal regulators. (JA: 3258,

Hart, Tr at 66; JA: 3526, Truchan, Tr at 1720.)[1] All of the contaminants at the site today were deposited between 1957 and 1977, before Cordova/California acquired the site. A prior owner of the site, the Ott Chemical Company ("Ott"), contaminated the site by dumping hazardous substances into unlined disposal lagoons and into area waterways. (Pet. App. 60a-61a.) Without a lining in the disposal ponds, the hazardous materials continuously seeped directly into the ground and groundwater at the site. (JA: 1951, Water Resources Commission Report dated 3/22/66; JA: 1996, 2000, Minutes of September 9, 1966, Ott Board of Directors Meeting at 5.) After just 18 months of operation, Ott degraded the groundwater from its initially "excellent" quality (JA: 1782, August 20, 1957, MSU Department of Agricultural Chemistry letter) to quality so poor that some pollutants were already at "[t]oxic, possibly fatal" levels. (JA: 1783, February 13, 1959, Ott memorandum.) The site's subsequent owner, the Story Chemical Company ("Story"), also contributed to the contamination, but the worst contamination occurred between 1957 and 1969, when Ott owned the site. (Pet. App. 60a-61a; JA: 2568, Keck Report Abstract at i-ii.) Chemicals used by Ott both before and during CPC's involvement with Ott, and chemicals used by Story had contaminated the ground and groundwater at the site well before Cordova/California purchased the property in 1977. (Pet. App. 60a-61a; Tx 1219; JA: 2413, July 2, 1976, Yohalem memorandum at 1.)

The testimony of state and federal investigative personnel confirms that the Cordova Parties did not contribute to the site's contamination. (JA: 3417-3418, Ostrodka, Tr at 43-44 (never determined that any of the hazardous materials discovered at the site were generated by Cordova); JA: 3258, Hart, Tr at 66 (no information that Cordova placed hazardous substances at the site); JA: 3526, Truchan, Tr at 1720 (no contamination resulted from the Cordova operations at

[1] The Court of Appeals Joint Appendix ("JA") encompasses eleven volumes. References to the Joint Appendix provide the relevant page number of the testimony or document cited.

the site); JA: 3494-3495, Shauver, Tr at 1785-86 (Cordova had not caused the problem, and in fact funded part of the cleanup).) In the words of James Truchan, Michigan Department of Natural Resource's ("MDNR") former Division Chief in Charge of Michigan Superfund Sites: "From all the information I have, during the time that Cordova operated, they operated in an environmentally sound manner, and their waste was properly handled and disposed of . . . . The waste that is causing the problem on that Site came from the Ott-Story era." (JA: 3179-3180, Truchan Deposition at 75-76.)[2]

The district court also recognized that the Cordova Parties operated in an environmentally safe manner and so found as a matter of fact under Fed. R. Civ. P. 52:

> During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

(Pet. App. 62a.) There is no evidence to the contrary.

[2] Mr. Truchan further stated that "any infractions would have been brought to my attention" as the person in charge of civil litigation for MDNR. (JA: 3185, Truchan Dep. at 277.)

II. CPC KNEW ABOUT AND EXPLOITED OTT'S ENVIRONMENTAL ABUSES.

A. Before It Acquired Ott, CPC Knew About Ott's Environmental Abuses.

CPC purchased Ott in 1965.[3] CPC took over Ott with full knowledge of the serious contamination Ott created at the site. (JA: 3427, Ott, Tr at 663; JA: 1785, 1791-1792, March 19, 1965, Ott Board Minutes at 7.) As the late James Eiszner, CPC's former president and CEO, attested: "I know that members of CPC were aware of the contamination on the site." (JA: 2910, Eiszner Deposition at 302.) CPC's knowledge of Ott's polluting activities dates back at least to 1963 when CPC's Chief Executive Officer and Chairman of the Board, Alexander McFarlane, began participating in governing Ott as a member of Ott's Board of Directors. (App. 64a; JA: 2756, 2762, February 22, 1963 Ott Board Minutes at 7; JA: 3388, Miller, Tr at 371.) In spite of Ott's environmental abuses, McFarlane recommended that CPC purchase Ott to integrate Ott's people into the CPC organization, obtain leadership for CPC's research efforts, and gain a foothold in the chemical business. (App: 64a; JA: 3265-3266, Hellman, Tr at 1297-98; JA: 1923, February 21, 1966, "Philosophy Behind Acquisition of Ott.")

B. Improper Waste Disposal Continued Throughout CPC's Tenure at Ott and the Volume of Waste Grew From the Influx of CPC Dollars.

After the takeover, CPC permitted Ott to continue the same environmental policies and abuse Ott had pursued before CPC assumed control. Most of Ott's disposal practices, including unlined lagoon disposal, continued unabated. This unchecked disposal of chemical

[3]To distinguish the Ott Chemical Company as it existed before CPC's 1965 acquisition from CPC's wholly-owned subsidiary, Ott will at times be identified as "Ott-I" or "Ott-II."

waste into unlined lagoons was the principal source of contamination at the site. (Pet. App. 60a-61a.) The worst contamination at the site occurred from 1957 to 1969, a period spanning most of CPC's operation of Ott. (JA: 2568, November 10, 1977, Keck Report Abstract at i-ii; JA: 2196, June, 1967 Supporting Papers for CPC Board of Directors.) As the District Court summarized, the egregious waste disposal practices extended throughout CPC's ownership of Ott and were not limited to unlined lagoon disposal. (Pet. App. 60a-61a.) Employees of Ott testified that Ott's waste disposal and pollution control policies during CPC's control were "very, very lax." (JA: 2845, Cregg Deposition at 39.)

When CPC took over Ott in 1965, CPC pumped millions of dollars into expanding Ott's production facilities (Pet. App. 66a-67a; R:84, CPC July 12, 1990, Summary Judgment Brief at 10) but did not address the resulting magnification of Ott's disposal problems. As Ott grew from the influx of CPC dollars, waste production also grew. (Pet. App. 67a ("CPC contributed millions of dollars to expansion efforts. This increase in production, in turn, created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons.").) The disposal lagoons expanded to accommodate the increased volume of waste water. (Pet. App. 67a.)[4] Throughout this period of expanding waste volume, CPC pushed Ott to delay addressing pollution problems. (Pet. App. 75a-76a; JA: 2189, March 28, 1967, Eiszner letter, ("Rick [Williams of CPC] feels that delaying tactics are almost always advisable.").)

[4]JA: 733, UF at ¶¶ 52, 53; JA: 3434-3437, Peterson, Tr at 460-63 (Waste lagoons enlarged, additional lagoons added, and the company continued to use the unlined disposal lagoons even after installation of an equalization basin in 1968); JA: 3499-3500, St. Martin, Tr at 153-54 (As Ott-II added more buildings and products, the company generated more waste and added more lagoons); JA: 3215 Burt, Tr at 1039; JA: 2025, September 20, 1966, meeting notes ("Plant expansion in early summer increase of 30% waste.").

Throughout the CPC era, Ott-II spilled thousands of gallons of hazardous materials, buried hundreds of drums containing hazardous substances, intentionally disposed of millions of gallons of chemical waste into unlined lagoons, and used environmentally harmful, though inexpensive, disposal methods. (Pet. App. 60a-61a; JA: 3322-3324, Hoover, Tr at 210-11, 240 (hundreds of drums buried); JA: 3554, Yost, Tr at 768 (hundreds of leaking drums); JA: 3501-3502, St. Martin, Tr at 161-62 (Chemical spills near the company railroad spur turned the sand blue).) Drums containing methyl isocyanate leaked onto the ground and created fumes that stung employees' eyes. (JA: 3545-3546, Whitaker, Tr at 187-88.) The wastewater collection tank overflowed once a week, spilling 200 to 500 gallons of waste. (JA: 3543-3544, Whitaker, Tr at 183-84.) Employees took drums of waste to a pit, punched holes in the drums with a fire axe, and allowed the waste to drain into the pit. (JA: 3319-3321, Hoover, Tr at 207-09; JA: 3216-3217, Cregg, Tr at 395-96 ("We took a fire ax and knocked the bottoms and the tops and the sides out of [drums] to let them drain"); JA: 3218, Cregg, Tr at 400 (Caustic and other scrubber materials drained onto the ground at least once a week); JA: 3222-3223, Cregg, Tr at 412-13 (Leaking pipes formed stalactites of chemicals).) The equalization basin overflowed on a monthly basis and chemical wastes flowed approximately 200 yards before sinking into the ground. (JA: 3414-3415, Norris, Tr at 520-21.) Fifty to 300 gallons of insecticide spilled over the top of railroad cars approximately three times every week, saturating the ground around the rail cars with the chemicals. (JA: 3082-3084, Rake Deposition at 13-15; JA: 3075-3077, Peterson Deposition at 36-38.) Two or three times per week the pressure from chemicals inside 1,000-gallon kettles caused discs to rupture. The kettles "regurgitated" their contents onto the ground, saturating the ground and staining it purple. (JA: 3080-81, Rake Deposition at 10-11.) The evidence of environmentally irresponsible waste disposal during CPC's era is overwhelming.

C. CPC Actively Managed All Aspects of Ott's Business, Including Ott's Environmental Problems.

1. CPC Exerted Policy-making Control over Ott Through Its Scientific Operating Committee and Its Development Company.

After CPC took over the Ott Chemical Company, Arnold Ott moved into the CPC organization as chairman of CPC's Scientific Operating Committee. (Pet. App. 65a; JA: 2925-2926, Garber Deposition at 66-67.) In 1967, CPC replaced the Scientific Operating Committee with the CPC Development Company, an unincorporated division of CPC which "actively participated in and exerted control over policy-making at Ott-II." (Pet. App. 72a.) CPC Development Company oversaw the operation of CPC's technical subsidiaries as one of six "profit centers" within CPC which CPC used to better manage the profitability of CPC's separate operating units, including Ott. (JA: 734, UF at ¶ 65; JA: 2263, April 25, 1969, Harder and McKee memorandum.) The Development Company's primary function was to ensure that operating units met profit plans and complied with CPC policies. (Pet. App. 72-73a, ("the development company regularly reviewed Ott II and recommended changes on matters ranging from finances to personnel"); JA: 3424, Ott, Tr at 596; JA: 3460, Roberts, Tr at 898 (Responsible for managing Ott-II and the other research businesses for CPC); JA: 2263, April 25, 1969, CPC Bulletin).) The Development Company's board of directors functioned as the board for Ott and the other technical and research subsidiaries of CPC. (JA: 2920-2922, Garber Deposition at 35-37.)

CPC used the Development Company to manage Ott. (Pet. App. 72a-73a.) Beverly Warner, the president of CPC's Development Company, was "responsible for Ott at CPC," and visited the Ott-II site at least quarterly. (JA: 3552, Yost, Tr at 749.) Warner actually began using Ott as his own business experiment, making pricing decisions, production decisions, and scheduling decisions for the company. In

fact, he became so involved in Ott's day-to-day operations that, according to the former chief executive officer of CPC, "he almost ruined the company" with his "terrible, terrible management decisions." (Pet. App. 71a; JA: 2912-2913, Eiszner Deposition at 452-53.)

2. CPC's Own Director of Environmental Matters intervened in Ott's Affairs to Delay Environmental Solutions.

CPC placed G. R. D. (Rick) Williams in charge of handling the pollution problems for CPC, naming him Director of Environment/Energy for the entire multibillion dollar CPC organization. (JA: 2431-2437, 1975-1976 CPC Almanac at 10.) As the District Court noted, Williams "actively participated in and exerted control over a variety of Ott-II environmental matters." (Pet. App. 75a.)[5] CPC required Ott personnel to check with Williams (or other CPC officials) before answering questions about Ott's environmental compliance. (Pet. App. 75-76a; JA: 2268, July 11, 1969, Williams letter ("We answer questions that are not self-incriminating, but we do not volunteer information"); JA: 2281, June 26, 1970, CPC policy letter (CPC's president directing the CPC operating companies not to provide

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[5]Ironically, some CPC witnesses now suggest that the late Mr. Williams was incompetent. (JA: 2911, Eiszner Deposition at 330.) If these people actually felt that way about Mr. Williams while they were working with him, it did not prevent CPC from entrusting Mr. Williams with responsibility for all of CPC's worldwide pollution control programs and other environmental matters. CPC either trusted the competence of Mr. Williams while he was alive and moving up the ranks at CPC, or willingly entrusted environmental matters to an incompetent employee. In either case, CPC is properly responsible for the environmental problems related to Mr. Williams' activities.

Williams had a long term career at CPC, progressing through a series of executive positions. Beginning in 1966, Williams served as CPC's Director of Air and Water Programs and retired in 1979 as the Corporate Director of Environmental Control for CPC International Inc. (JA: 2262, March 3, 1969, CPC News Bulletin.)

information or access to files to any federal, state, or local government without prior approval from CPC's general counsel); JA: 2312, August 20, 1971, pollution procedures; JA: 2317, October 26, 1971, Williams memorandum (CPC requiring Ott-II personnel to check with CPC before responding to requests for information regarding Ott-II's polluting activities from citizens, public bodies, or the media).) A CPC official on Ott's Board directed Ott to contact Williams for help with Ott's disposal problems. (JA: 1996, 2004, 2017, September 9, 1966, Ott Board of Directors Meeting at 9, 22.) Ott's officers soon recognized that Williams felt "delaying tactics are almost always advisable" when dealing with regulatory authorities. (Pet. App: 75a; JA: 2189, March 28, 1967, Eiszner letter.)

As a result of Williams' direct participation in waste disposal discussions at Ott and with the Water Resources Commission, Ott-II dropped plans for proposing installation of a biological waste treatment facility. (Pet. App. 75a.) In the spring of 1966, Ott-II was under pressure from the state regulators to solve Ott-II's waste disposal problems. (JA: 1928, 1930, March 2, 1966, Arnold Ott memorandum, at 3.) In fact, the Executive Secretary of the Water Resources Commission, Mr. Oeming, had told Ott-II's representatives that their proposed schedule for addressing the groundwater discharge problems was "unconscionable," and threatened to close the plant down if Ott-II did not take rapid and concrete action. (JA: 3394, Newhof, Tr at 1071; JA: 3400-3403, Newhof, Tr at 1105-08; JA: 3243-3244, Gottlieb, Tr at 1502-03; JA: 1953, May 23, 1966, Gottlieb memorandum; JA: 1955, May 24, 1966, meeting notes.) Ott was more interested in a cheap solution than an effective one. (JA: 3403, Newhof, Tr at 1108 (Ott's consultant reporting to Ott that they were "working with the idea in mind that [they] had to have the absolutely cheapest solution"); JA: 1955, May 24, 1996 meeting notes.)

Williams advised Ott-II "that no mention be made of biological treatment facilities," in the presentation to the State Water Resources Commission. (Pet. App. 75a; JA: 2180-2182, December 1, 1966,

Williams Progress Report, at 3; JA: 3284, Hellman, Tr at 1364.) This was consistent with Williams' general policy of delaying waste disposal improvements (Pet. App. 75a-76a; JA: 2189), but contrary to the recommendation of Ott's own vice president of manufacturing and Ott's own consultants. (JA: 3253-3254, Gottlieb, Tr at 1527-28; JA: 2160, 2173, November 18, 1966, Ott Board Minutes, at 14; JA: 1987, September 9, 1966, Gottlieb Report to Ott Board of Directors, at 7; JA: 3405, Newhof, Tr at 1120-1126; JA: 3285-3286, Hellman, Tr at 1366-1367.) At the next meeting with state officials, Williams accompanied the Ott-II negotiators. As Williams recommended, Ott-II never presented the biological treatment plan proposed by Ott-II's own consultant. (JA: 2026, September 22, 1966, Gottlieb memorandum; JA: 2149, November 11, 1966, Eiszner memorandum (James Eiszner relaying the outcome of the meeting to Dr. Ott, and specifically referencing the cooperation of Williams in the evolution of the waste-disposal program, as "Corn Products' specialist in waste disposal").)

Ott never built a biological waste treatment facility for the site. (JA: 3286, Hellman, Tr at 1367; JA: 3404, Newhof, Tr at 1112.) Williams reported to his CPC superiors that while the consultant's programs had indicated "the necessity for a biological treatment facility by 1970," he hoped that by postponing presentation of the treatment option to state officials, Ott-II might be able to avoid the $350,000 expense of treating its own waste before discharging it. (JA: 2180, 2182, December 1, 1966, Williams Progress Report, at 3.) Williams managed to save money for CPC and its operating units by delaying environmental management at Ott.

3. CPC Officials Assumed Responsibility for Other Environmental and Regulatory Matters at Ott.

CPC remained directly involved in Ott environmental regulatory matters. Through Williams, CPC counseled Ott personnel on everything from how to fill out environmental survey forms to how

to handle regulatory visits (Pet. App. 75a-76a), and conducted overall cost benefit analyses regarding Ott's entire pollution response programs. (JA: 2251, June 6, 1968, Williams memorandum; JA: 2180, December 1, 1966, Williams Progress Report.) Ott personnel received instructions to notify CPC of plant visits by governmental agencies. (Pet. App. 75a; JA: 2258, November 27, 1968 safety committee meeting minutes; JA: 2251, June 6, 1968, Williams memorandum.) CPC instructed Ott personnel to delay responding to requests for information from federal agencies. (Pet. App. 75a; JA: 2313, September 22, 1971, Williams letter ("We have . . . not as yet made a decision as to whether or not we should fill it out . . .).) Ott personnel in charge of disposal and compliance matters looked to CPC personnel for instructions on how to deal with the Corps of Engineers and the United States Environmental Protection Agency. (JA: 2348, February 22, 1972, Nance letter ("please review this and determine what action I should take."); JA: 2347, February 14, 1972, Nance letter ("The last word I had from you was that we were not to reply to this report. Does this still hold and, if so, what should we do?").)

CPC's legal counsel and Executive Vice President also became intimately involved in making arrangements with the State of Michigan for Ott's continued discharge of waste materials. (Pet. App. 76a.) Members of CPC maintained active involvement in constructing Ott's wastewater discharge agreements. Hanes Heller, a member of CPC's legal staff, outlined his concerns to the President of CPC's Development Company: "If CPC is to guarantee Ott's obligations, approval should be obtained from the requisite authority, whether the Board of Directors or Mr. Harder [Chairman and CEO of CPC]." (JA: 2291, 2293-94, November 4, 1970, Heller memorandum at 3-4.) Heller also personally intervened in Ott's discussions with the Water Resources Commission regarding Ott's persistent inability to control its wastes. (JA: 2303, January 6, 1971, Nance letter (Heller participating in telephone conferences with Water Resources Commission); JA: 2306, January 13, 1971, Heller memorandum; JA: 2291, November 4, 1970, Heller memorandum; JA: 2279, May 26, 1970, Nance letter (asking Lundy,

CPC's in-house counsel, to review waste disposal agreement); JA: 2280, June 22, 1970, Nance letter to Hanes Heller of CPC regarding stipulation from Michigan Water Resources Commission ("I will depend on your comments to determine if this is suitable."); JA: 2290, October 22, 1970, Nance letter to Wascher at CPC regarding waste disposal negotiations with the Water Resources Commission).)

D. CPC Received Millions of Dollars When It Sold Ott-II to Story.

In 1971 and 1972, CPC engineered a transaction in which Ott-II sold its assets and liabilities to Story for approximately $6.6 million in cash and a $4 million note in the form of convertible subordinated debt. (Pet. App. 78a; JA: 2407, March 15, 1976, Agreement between CPC and Story.) Ott-II changed its name to Four Lakes Chemical Company ("Four Lakes") (Pet. App. 78a), and transferred the $4 million note to CPC as a dividend. (JA: 2380, August 28, 1973, Wills memorandum.) Moreover, even though CPC executives were well aware of the serious environmental liability at the site, CPC also removed the $6.6 million cash payment from Four Lakes and left Four Lakes as a shell corporation with no assets. (JA: 2380, August 28, 1973, Wills memorandum; JA: 3351-3353, Knief, Tr at 1489-92.)

For six months following the sale, CPC actually "operated the business for Story." (JA: 2378, August 16, 1973, Knief memorandum.) To protect CPC's equity stake in Story, Beverly Warner, president of the CPC Development Company and former Ott-II board member, accepted a position on the Story board of directors. (JA: 2376, July, August, 1972, "Blotter" article; JA: 2727, August 15, 1977, Order Rejecting Executory Contract.) CPC retained its interest in Story for two more years, and in 1976, CPC agreed to cancel Story's outstanding debt in exchange for an agreement that Story would not hold CPC liable for Story's mounting obligations. (JA: 2407, March 15, 1976, Agreement between CPC and Story; JA: 2392, December 4, 1975, CPC telephone message notes (evidencing concern at CPC regarding potential litigation

over Story).) Later that year, Story filed for bankruptcy. (JA: 752 UF at ¶ 170.) Maurice Edelman, a bankruptcy trustee for Story's creditors, assumed title to the site and attempted to find a buyer. (Pet. App. 78a.)

III. THE STATE OF MICHIGAN INDUCED CORDOVA/CALIFORNIA TO ACQUIRE THE SITE FROM A BANKRUPTCY TRUSTEE BY PROVIDING A WRITTEN RELEASE FROM ALL POTENTIAL LIABILITY TO ANY GOVERNMENTAL AGENCY FOR CONTAMINATION LEFT BY PRIOR OWNERS AND OPERATORS OF THE SITE.

After Story filed for bankruptcy in 1976, the bankruptcy trustee succeeded to title of the site by operation of law. The trustee attempted to sell the property to various parties. Because Ott and Story had caused such serious contamination problems, no purchasers could be found. (JA: 2472, April 11, 1977 MDNR letter; Tx 970, April 5, 1977 Uniroyal Chemical rejection letter; JA: 746, UF at ¶¶ 134, 136-137, 159.)

The State of Michigan became heavily involved in trying to sell the property because it realized that the State would bear the entire cost of cleaning up the contamination left by Ott and Story if no purchaser were found. (Pet. App. 81a; JA: 748, UF at ¶ 144; JA: 2554, October 13, 1977 MDNR memorandum; JA: 2982, Hogarth Deposition at 114.) A purchaser would not only provide additional funding to help pay for the cleanup but also make the site productive by providing jobs and a better tax base for the area. Accordingly, MDNR and other branches of the State sought to consummate a sale by encouraging prospective purchasers, including Cordova/California, to purchase the site. Even Michigan's Governor became involved. (JA: 2567, October 19, 1977 Milliken letter.)

Cordova/California considered purchasing the site as a possible location for a new ethylenimine ("EI") manufacturing operation and began negotiations with State officials. (JA: 761, UF at ¶ 195.) The Ott/Story contamination became a central negotiating item. Cordova/California was absolutely opposed to accepting financial responsibility for contamination caused by others. Accordingly, Cordova/California insisted that, before any purchase, the MDNR agree on precisely what Cordova/California would have to pay or do to obtain a complete release from all relevant governmental agencies for past contamination caused by Ott and Story. (JA: 3165, Swanson Deposition at 127.) State officials recognized that to induce Cordova/California to purchase the site and contribute to the cleanup, the State would have to grant Cordova/California protection from any liability related to the existing contamination. (JA: 3513-3514, Truchan, Tr at 1660-61; JA: 3316, Hogarth, Tr at 1908 ("It was obvious that Cordova would not enter the agreement if it had any responsibility for groundwater cleanup.").)

On October 13, 1977, the parties signed the Stipulation and Consent Order as their final agreement.[6] (Pet. App. 83a; JA: 2550, Stipulation and Consent Order.) Under the agreement, Cordova/California agreed to purchase the site, to pay $600,000 to MDNR, and to neutralize phosgene left at the site by Story. (Pet. App. 85a-86a, 88a.) Neutralization of the phosgene gas was the State's highest cleanup priority for the site because the gas created a serious health and safety risk to the community. (JA: 3506, Truchan, Tr at 1651; JA: 3468, 3479, Rustem, Tr at 1573, 1631-1632; R:404, Hogarth, Tr at 1895-1896; JA: 2554-55, October 13, 1977 DNR memo at 2 ("The number 1 priority would be destruction of the phosgene.".) In exchange, the State agreed to assume legal and financial responsibility for all other cleanup efforts and to release Cordova/California from all potential liability to *any* government agencies, including the MDNR. (Pet. App. 87a.)

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[6] At the time of the purchase, Cordova/California was a separately incorporated subsidiary of Aerojet. Cordova/California later formed its own subsidiary corporation, Cordova/Michigan, to conduct the actual operations at the site.

The Stipulation and Consent Order precludes MDNR from bringing any action against the Cordova Parties based on the contamination caused by others at the site. MDNR specifically agreed to assume the risk of underestimating the problems at the site. (JA: 2550, Consent Order, p. 2, ¶ 6.) The agreement applies broadly to all potential liability arising out of the prior contamination:

> 6. . . . The Cordova Chemical Company shall not have any liability in the event that the said $600,000 is not in fact sufficient for the intended purposes . . .
>
> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary or advisable in connection with the contamination emanating from the Story Chemical Corporation property, including, without limitation the creation, maintenance, and operation of any purge wells.
>
> . . .
>
> 8. Compliance with this Consent Order shall constitute full satisfaction of all relief, civil or administrative, which might have been, or which otherwise might be obtained against Cordova Chemical Company for any contamination of groundwaters or other pollution, injury, or damage, to the environment or otherwise, caused by acts or omissions of Story Chemical Corporation, or its predecessors, or arising out of operations of the Story Chemical Corporation facilities, which acts, omissions or operations occurred prior to the effective date of this Consent Order,

> whether the contamination, pollution, injury or damage occurs prior to or after the effective date hereof.

(JA: 2550, Consent Order ¶¶ 6, 8.) The head of MDNR and the office of Michigan's Attorney General signed on behalf of the State. The Michigan Court of Appeals has ruled that this agreement obligates the State of Michigan to reimburse the Cordova Parties for any liability they incur in this action. *Cordova Chemical Co. v. Department of Natural Resources*, 212 Mich. App. 144, 536 N.W. 2d 860 (1995). The Michigan Supreme Court has denied the State's request for leave to appeal. *Cordova Chemical Co. v. Department of Natural Resources*, 453 Mich. 901, 554 N.W. 2d 319 (1996).

IV. CORDOVA/CALIFORNIA AND ITS SUBSIDIARY, CORDOVA/MICHIGAN, OPERATED THE SITE RESPONSIBLY AND DID NOT ADD NEW CONTAMINATION TO THE SITE OR EXACERBATE CONTAMINATION LEFT BY OTHERS AT THE SITE.

A. Cordova/California and Cordova/Michigan Operated With More Than Adequate Capitalization of Millions of Dollars in an Ultimately Unsuccessful Effort to Create a Viable Business at the Site.

Cordova/California operated as an Aerojet subsidiary with millions of dollars in capital. (JA: 752, UF at ¶ 171.) It used a large portion of the capital to improve the site. The total purchase price for the site was approximately $2.5 million. This price included payment of more than $800,000 to the National Bank of Detroit ("NBD") at a

foreclosure sale[7] and $600,000 to the State of Michigan to fund cleanup activities. (JA: 2986, Howes Deposition at 29-32.) As a part of the purchase, Cordova/California also addressed the State of Michigan's most pressing environmental concern by neutralizing phosgene gas left by prior owners and operators of the site. (JA: 768, UF at ¶ 233.) After the purchase, Cordova/California had to spend millions more to prepare the site for operations because of the site's poor condition. (JA: 2992-2993, Howes Deposition at 43-44 ("[T]here was just an unbelievable gross mess that took many months to diffuse . . . It took quite awhile to get . . . the place cleaned up."); Tx 1339, October 20, 1989 *de minimis* proposal at 5-6.) The total amount spent before commencement of operations was approximately $19,000,000. (*Id.*)

On November 2, 1978, Cordova/California incorporated its own subsidiary corporation, Cordova/Michigan, to conduct operations at the site. (Pet. App. 94a; JA: 763, UF at ¶ 208.) Cordova/California and Cordova/Michigan were each capitalized with millions of dollars (Pet. App. 93-94a) in an effort to make the Michigan operation a viable enterprise which could "stand on its own feet." (JA: 3116, Simmons Deposition at 100; JA: 3009, Matthews Deposition at 9; JA: 3068, Payton Deposition at 22.)[8] They were bona fide commercial ventures launched with strong financial support. Unfortunately, the ventures did not succeed commercially. An unsuccessful commercial venture by a subsidiary does not and should not expose its owner to enormous liability for contamination caused by others.

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[7] An additional $500,000 payment to NBD was not required because Cordova never made any profits at the site. (Tx 1013, October 11, 1977, Agreement with NBD.)

[8] Cordova/California was capitalized in 1977 with $10,000 in common stock and $7,161,630 in additional paid-in capital. (Pet. App. 93a; JA: 752, UF at ¶ 171.) Cordova/Michigan was capitalized in 1978 with $250,000 in common stock and $2,843,226 in additional paid-in capital. (Pet. App. 94a; JA: 753, UF at 175; R:184 at Exhibit 34, Cordova Defendants' responses to CPC's Interrogatories Nos. 40, 41.)

B. Cordova/California and Cordova/Michigan Added No New Contamination to the Site and Did Not Exacerbate Contamination Left by Others at the Site.

The record demonstrates that all contamination at the site was caused solely by the companies that owned and operated the site before the bankruptcy trustee succeeded by operation of law to ownership of the site in 1977.[9] Evidence of releases from unlined seepage lagoons, chemical spills, leaking drums and various other sources during operation of the facility by those prior owners is overwhelming. (Pet. App. 60a-61a.) As early as 1967, in a capital expenditure request to CPC's Board of Directors, CPC itself conceded that its Ott subsidiary was polluting the site. (JA: 2196, June, 1967, supporting papers for CPC Board of Directors.)

In stark contrast, there is no evidence that Cordova/Michigan, Cordova/California or Aerojet caused any pollution at the site. Cordova/California and Cordova/Michigan ran environmentally sound operations. This fact is supported not only by the testimony of former and current employees of Cordova/California and Cordova/Michigan, but also by the testimony of officials for both government agencies that have made CERCLA claims against the Cordova Parties in this case. (JA: 3180, Truchan Deposition at 76; JA: 2942, Hart Deposition at 90-91, 95-102, 110-113.) The Cordova Parties simply did not cause contamination at the site.

The Cordova Parties also acted reasonably in responding to contamination by others at the site. Before agreeing to purchase the property, Cordova/California reached an agreement with the State of Michigan and MDNR that addressed all the environmental problems at the site and assigned responsibility for abatement and remedial actions.

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[9]No one has alleged that the bankruptcy trustee caused or contributed to the release or threatened release of hazardous substances at the site.

(JA: 2550, Consent Order; JA: 3141, Swanson Deposition at 57-59.) Cordova/California satisfied its obligations under the agreement by removing phosgene which had been left on site and by providing the agreed-upon funds to the State of Michigan. (Pet. App. 90a; JA: 2573, January 4, 1978, correspondence from MDNR; JA: 2579, February 16, 1978, correspondence to Hogarth; Tx 1130, correspondence to MDNR and canceled checks). Cordova/California also removed contaminated sludge left in the equalization basin by the previous owners. (Pet. App. 62a.) Cordova/Michigan disposed of abandoned drums that the State failed to remove. It also demolished and disposed of contaminated buildings and equipment left by the previous owners before commencing any operations at the site. (R:187 at Exhibit Q, Response to CPC's Interrogatories at 41; Tx 1364, Peden Affidavit, ¶ 5.) All of these actions were taken with due care and in the interest of improving the environmental condition of the site.

Moreover, the Cordova Parties did nothing to worsen the existing groundwater contamination at the site. The contaminated groundwater plume at the site had stabilized by 1976, before any of the Cordova Parties had any contact with the site, as the trial court had determined in prior litigation involving CPC's responsibility for the contamination emanating from the site. (JA: 2736-2744, Findings of Fact from *Gollach v. CPC Int'l, Inc.*, W.D. Mich. August 17, 1981, at ¶ 28.) The shape of the plume has not significantly changed since that time. (JA: 2803, February 7, 1983, Correspondence from CPC's counsel to U.S. EPA at 2 ("The plume is laterally stable.").) Thus, any natural migration that occurred in this case is limited to movement of water molecules through an already-defined and stationary groundwater plume.

SUMMARY OF ARGUMENT

The court of appeals and all parties to this case recognize two separate and distinct potential theories of liability for parent

corporations under § 107(a)(2). The first is a derivative liability theory under applicable corporate law principles of veil-piercing. No party is challenging before this Court the propriety of the Sixth Circuit's conclusion that neither Aerojet nor CPC is properly liable on this derivative theory. The second theory of liability recognized by all parties and the Court of Appeals is direct statutory liability for the parent company's own conduct. The real question before this Court is under what circumstances the direct liability contemplated by the language of the statute attaches to a parent corporation.

The United States advances the participation and control standard created by the district court. This test, however, improperly isolates a portion of the complete statutory text and fails to limit direct liability to parties who actually contributed to pollution at the site. This test also fails to realize the conceptual difference between direct and derivative theories of liability, since the United States, like the district court, asserts that direct liability under Section 107(a)(2) can attach to a parent corporation solely on the basis of its relationship with its subsidiary corporation. The Sixth Circuit properly rejected this proposed standard of direct operator liability as nothing but a federalized veil-piercing test without any basis in the statutory text.

A proper test for direct liability under § 107(a)(2) must be based upon the plain language of the statute. Section 107(a)(2) of CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607. Liability under the plain terms of the statute is thus based upon the relationship between a potentially responsible person, a facility owned or operated by such person, and a time of disposal of hazardous substances. A test for direct liability that encompasses all of these elements is mandated by both the plain terms of the statute, and CERCLA policy. As the United States notes, Congress's intent in enacting CERCLA was to ensure that those responsible for polluting bear the costs of their actions. This policy is not served by a test that imposes liability on a parent

corporation without regard to its involvement in the pollution that occurred at the facility.

The Cordova Parties cannot be liable under § 107(a)(2) because there was no disposal of hazardous substances during the time that Aerojet and its subsidiaries were involved with the site. The district court noted that two hazardous chemicals used by the Cordova Parties are present in the soil and groundwater at the site, but the district court made no finding that it was the Cordova Parties that disposed of these substances. To the contrary, the record evidence indicates that such chemicals were disposed of by previous owners and operators of the facility, not by the Cordova Parties. The district court also referenced the possibility of the continued natural migration of hazardous materials dumped at the site by previous owners and operators, but such passive migration is insufficient as a matter of law to constitute disposal within the meaning of § 107(a)(2). Since the Cordova Parties had no involvement whatsoever with the disposal of any hazardous substances at the facility, they cannot be liable under § 107(a)(2).

CPC, in contrast, should be held directly liable since it was directly involved in operating facilities at its subsidiary's site at a time of continuing disposal of hazardous substances. The district court found that CPC was directly involved in the environmental and regulatory affairs of its subsidiary, controlling "specific policy matters including hazardous waste disposal." (Pet. App. at 74a-76a.) The District Court further found that CPC was involved in both major policy decisions and day-to-day operations at the site. (Pet. App. at 111a.) CPC's direct statutory liability turns not on its overall relationships with a subsidiary -- an issue properly governed by state corporate law -- but on its own conduct at the site.

Finally, even if the Cordova Parties were otherwise liable, the third-party defense provided by § 107(b)(3) of CERCLA would require dismissal of the claims against them in any event. The Cordova Parties meet all of the requirements for application of § 107(b)(3) third-party

defense, in that contamination at the site was caused solely by third parties, the Cordova Parties had no disqualifying contractual relationship with the parties that did cause the contamination, and the Cordova Parties exercised reasonable care in their activities at the site.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT NEITHER CPC NOR AEROJET IS DERIVATIVELY LIABLE FOR ITS SUBSIDIARY'S CONDUCT BECAUSE THERE IS NO BASIS FOR PIERCING THE CORPORATE VEIL UNDER APPLICABLE STATE LAW.

A parent corporation may be derivatively liable for a subsidiary's obligation where circumstances justify piercing the corporate veil under applicable state corporate law. This general principle of corporate law applies to a subsidiary's CERCLA liability as well. The Sixth Circuit properly concluded that the record does not support derivative liability for either CPC or Aerojet under applicable state corporate law of veil piercing. (Pet. App. 15a-17a, 20a-22a.) The government does not contest this ruling before this Court.

II. THE COURT OF APPEALS CORRECTLY RECOGNIZED A DIRECT LIABILITY THEORY FOR PARENT CORPORATIONS DISTINCT FROM AND INDEPENDENT OF DERIVATIVE LIABILITY UNDER STATE CORPORATE LAW.

The court of appeals and all parties to this case recognize the potential for the direct liability of a parent corporation under § 107(a)(2). Twice in its opinion the court of appeals noted that, in addition to derivative liability through veil piercing, a parent

corporation could also be liable under § 107(a)(2) if it directly operated the facility through its own actions, either independently or along with its subsidiary. (Pet. App. 12a, 17a.) Indeed, the majority took the dissent to task for suggesting that its opinion held that a parent corporation could not be directly liable under § 107(a)(2) as an operator of a facility owned by its subsidiary, a characterization it called "mistaken." (*Id.* at 17a, n. 5.) The United States agrees that the statute creates a direct liability theory analytically distinct from derivative liability through veil-piercing. (U.S. Brief at 34). CPC also acknowledged before the court of appeals the viability of a direct liability theory. (Supplemental Brief of CPC in the Sixth Circuit, October 30, 1995, at 14 n.5). The Cordova Parties have maintained this position since the inception of the case.

All parties, then, are on common ground in recognizing two distinct pathways of potential liability for a parent company under CERCLA § 107(a)(2). This is the same conclusion reached by every court of appeals to address the matter. (*See* Cordova Parties' Brief Opposing Petitions at 6-8). The real question for this Court, then, is not whether a parent corporation can be directly liable under CERCLA, but under what circumstances such direct liability attaches. It is on this question that the positions of the parties and the court of appeals diverge.

The government adopts the participation and control standard created by the district court, and in so doing commits two errors. First, it isolates a portion of the complete statutory text and neglects to limit direct liability to parties who actually contributed pollution to the site. Second, it fails to offer the Court what it promises: namely, a theory of liability analytically distinct from the corporate law of veil-piercing. Instead, like the district court, the government merely repaints the veil-piercing analysis in federal colors. Indeed, in imposing direct liability on Aerojet, the district court relied on exactly the same reasoning and factual points it used in the veil-piercing analysis. (Pet. App. 124a.) This is not an analytically distinct theory of liability.

The need for a truly distinct theory of direct operator liability was the core insight of the court of appeals. When liability depends upon the overall relationship between a parent and a subsidiary corporation, the proper legal framework is and ought to be supplied by applicable state law principles of corporate law. Accordingly, the Sixth Circuit properly rejected a direct federal theory of liability that would, in effect, create a federal common law of corporations. Instead, the Sixth Circuit properly concluded that direct operator liability must depend upon the relationship between the parent corporation and the polluting facilities in question. Where a parent corporation actually operates the polluting facilities of its subsidiary, then direct liability may be imposed regardless of whether the overall relationship between the two companies warrants veil-piercing under applicable state law.[10] Otherwise stated, a parent corporation may incur direct liability under CERCLA through its own actions at a subsidiary's facilities without subjecting itself to derivative liability under the veil-piercing provisions of the applicable state law.

The test for direct statutory liability must begin with the words of the statute. Section 107(a)(2) of CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607. Thus, liability under the plain terms of the statutory language is based upon the relationship among a person (including a corporation), a facility owned or operated by the person,

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[10]The Cordova Parties believe the court of appeals correctly drew a sharp, analytical distinction between derivative and direct theories of liability, but the Cordova Parties do not agree that the court of appeals correctly applied the direct liability theory to CPC. Even CPC acknowledged in the court of appeals that a parent corporation can be directly liable if it is involved in day-to-day operations at a subsidiary's facility. (Supplemental Brief of CPC in the Sixth Circuit, October 30, 1995, at 14 n.5). This is precisely what the district court found CPC had done, and there is overwhelming record support for the district court's conclusion. (Pet. App. 111a; *see also infra* at 9 to14.)

and a time of disposal of hazardous substances. This required nexus between the potentially responsible person and the pollution at the facility is not only mandated by the statutory text, but is also consistent with the most basic policies underlying CERCLA. Congress enacted CERCLA, as the United States repeatedly states, to ensure that those responsible for polluting bear the costs of their actions. (U.S. Brief at 4-5 (quoting S. Rep. No. 848, 96th Cong., 2d Sess. (1980) at 13; H.R. Rep. No. 1016, 96th Cong. 2d Sess. Pt. I (1980) at 17). Thus, liability under § 107(a)(2) must be premised not simply upon a potentially responsible corporation's relationship with another corporation that conducts business at the facility, or even with its relationship to a facility in the abstract. Liability must be premised upon the corporation's relationship to site facilities at "the time of disposal of . . . hazardous substances." The United States sidesteps this crucial limitation of the statutory test, urging that liability be imposed on Aerojet based solely upon its relationship with its subsidiary. This is not the proper focus of the statutory test. Section 107(a)(2) makes a corporation liable for operating a polluting facility, not for operating a subsidiary.

III. THE CORDOVA PARTIES ARE NOT DIRECTLY LIABLE UNDER SECTION 107(a)(2) BECAUSE NONE OF THEM OPERATED FACILITIES AT THE TIME OF DISPOSAL.

The Cordova Parties cannot be liable under § 107(a)(2) because there was no disposal of hazardous substances during the time that Aerojet and its subsidiaries were involved with the site. This is true even if this Court adopts the participation and control test urged by the government because § 107(a)(2) imposes liability only for owning or operating facilities *at the time of disposal*. There was no disposal during the tenure of the Cordova Parties.

The district court recognized that Aerojet and its subsidiaries did not pollute the site. "During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras . . . Cordova/Michigan discharged chemical waste through off-site disposal." (Pet. App. 62a.) The record contains no evidence of any new disposal of hazardous materials during the tenure of Aerojet and its subsidiaries. Nevertheless, the district court found that such "disposal" had occurred for purposes of liability under § 107(a)(2) based upon two theories. First, the district court noted that "two hazardous chemicals used in small amounts by Cordova/Michigan--benzene and 1, 2 dichloroethane ("1, 2-DCA")--are in the soil and groundwater at the site." (Pet. App. 62a.) Second, the district court referenced the possibility of the continued natural "migration" of hazardous materials dumped at the site by the site's previous owners. (Pet. App. 61a-62a.) Neither of these circumstances amounts to a "disposal" of hazardous substances for purposes of § 107(a)(2) liability.[11] The district court was mistaken.

A. Cordova/Michigan Did Not Dispose of 1,2 DCA or Benzene at the Site.

The district court's first basis for liability erroneously equates "use" with "disposal." Cordova/Michigan did use 1, 2 -DCA in its manufacturing processes, but there is not a shred of evidence in the voluminous record that it ever disposed of 1, 2-DCA, and that is the reason no party has cited any evidence to support that proposition. Benzene was left on site by previous occupants and disposed of by

[11]The court of appeals did not directly resolve this issue, but it did indicate that there did not appear to be any disposal during the tenure of the Cordova Parties and it directed the district court to reconsider the question on remand. (Pet. App. 21a-22a.)

Cordova/Michigan *off site*. Both of these chemicals, benzene and 1, 2-DCA, were used and spilled extensively by the site's prior owners and operators. Both chemicals were present in the site's groundwater before Cordova/California acquired the site. (Tx 1487 (November 25, 1968 Ott II Safety Inspection Memorandum); Tx 1504 (April 10, 1973 Story Testing Memo); Tx 1116 (November 28, 1978 Memo Regarding Groundwater Constituents).) While the use by a party of a hazardous chemical found in the soil and groundwater at a site may be evidence of a "disposal" of such chemical by the party if the party is the only one that has ever used the chemical at the site, *see, e.g., Sunnen Products Co. v. Chemtech Industries, Inc.*, 658 F. Supp. 276 (E.D. Mo. 1987), that is not the case here. The record simply does not support the conclusion that Cordova/Michigan "disposed" of benzene or 1, 2-DCA at the site.

B. Natural Migration In Groundwater Of Contaminants Deposited By Others Is Not Statutory Disposal.

The continued natural migration of contaminants left in the ground by others is not "disposal" of hazardous substances within the meaning of § 107(a)(2). Two courts of appeals have recently ruled, consistent with the Cordova Parties' position, that such passive migration is not "disposal" under CERCLA. *See ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2d Cir. 1997); *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996). These rulings are consistent with the text, structure and purposes of CERCLA. The Cordova Parties cannot be held liable under § 107(a)(2) because no disposal of hazardous substances occurred at the site during the tenure of its subsidiaries.

The Third Circuit Court in *CDMG* noted that the definition of disposal begins with "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water." 42 U.S.C. § 6903(3). The *CDMG* court

further noted that courts that have ruled that passive migration can constitute disposal have generally focused on the words "leaking" and "spilling" in that definition, since these terms do not necessarily suggest active human conduct. *CDMG*, 96 F.3d at 714 (citing the district court's ruling in this case, *CPC International, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1278 (W.D. Mich. 1991) and *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd.* 688 F.2d 204 (3d Cir. 1982)). In the context of this definition, however, "leaking" and "spilling" should be read to require active human conduct. Both terms also have meanings that require active human conduct. *CDMG*, 96 F.3d at 714 (citing Webster's Dictionary definitions of these terms, which set forth that "leak" can be defined as "to permit to enter or escape through a leak," and "spill" can mean "to cause or allow to pour, splash, or fall out"). "Meaning derives from context, hence the constructional canon *noscitur a sociis*, which states that one may infer meaning by examining the surrounding words. The words surrounding 'leaking' and 'spilling'—'discharge,' 'deposit,' 'injection,' 'dumping,' and 'placing'—all envision a human actor." *Id.* It may be inferred then that Congress intended that disposal always requires active human conduct. *Id.; see also* Robert L. Bronston, Note, *The Case Against Intermediate Owner Liability for Passive Migration of Hazardous Waste*, 93 Mich. L. Rev. 609, 616 (1994). Natural migration occurs without active human conduct.

Moreover, even if disposal does not always require active human conduct, the passive migration that occurred here cannot constitute disposal in any case. Although the terms "leaking" and "spilling" also have passive definitions that do not necessarily require active human conduct, "neither word denotes the gradual spreading of contamination." *CDMG*, 96 F.3d at 714. A common passive definition of "leak" is "to enter or escape through a hole, crevice, or other opening." *Id.* This definition requires that a substance "leak" from an opening, as in the escape of waste through a hole in a drum or tank. *Id.* No such "leak" occurred here. Likewise, although "spilling" also has passive definitions, none would apply to the passive migration in

groundwater of contaminants left by others at issue here. "Passive definitions of 'spill' suggest a rapid torrent, not gradual passive migration over the course of several years." *Id.*

The Third Circuit in *CDMG* noted that "it is especially unjustified to stretch the meanings of 'leaking' and 'spilling' to encompass the passive migration that generally occurs in landfills in view of the fact that another word used in CERCLA, 'release,' shows that Congress knew precisely how to refer to this spreading of waste." *CDMG*, 96 F.3d at 714; *see also ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 358 (2d Cir. 1997). While § 107(a)(2) only imposes liability for "disposal" of hazardous substances, other subsections of the statute trigger action where there is a "release" of such hazardous substances. 42 U.S.C. § 9606(a). CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, *leaching*, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." 42 U.S.C. § 9601(22) (emphasis added). The term "release" is thus broader than the term "disposal." The term "release" includes "disposal," but it goes beyond "disposal" by including leaching within its definition.

The courts of appeals that have considered this issue have found it particularly noteworthy that the definition of "release" includes the term "leaching," which is not included in the definition of "disposal." *CDMG*, 96 F.3d at 715; *ABB*, 120 F.3d at 358. Unlike the other terms encompassed in the definition of disposal, the term "leaching" *is* commonly used to describe passive migration. *CDMG*, 96 F.3d at 715; *ABB*, 120 F.3d at 358. The Third Circuit in *CDMG* surveyed definitions and usage of the term "leaching," and noted that:

> "Leaching" is "the process or an instance of separating the soluble components from some material by percolation." Webster's, supra at 1282. Leaching of

> contaminants from rain and groundwater movement is a principal cause of contaminant movement in landfills, see Superfund Manual, supra at 8, and is the predominant cause of groundwater contamination from landfills, Edward Repa & Charles Kufs, Leachate Plume Management 2 (1985). The word "leaching" is commonly used in the environmental context to describe this migration of contaminants. See, e.g., Steven Ferrey, The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste, 58 Geo. Wash. L.Rev. 197, 207 n. 34 (1988) ("Leachate is liquid or water soluble contaminated substances that migrate away from the point source of contamination in groundwater or surface water, often influenced by rain and normal water table activities. Such a phenomenon is described as 'leaching' of contaminants").

CDMG, 96 F.3d at 715. That Congress used the term "leaching" in the definition of "release" demonstrates that it was aware of the concept of passive migration and that it knew how to impose liability for such leaching if it desired to do so. *CDMG*, 96 F.3d at 715; *ABB*, 120 F.3d at 358. Yet Congress did not impose such liability on prior owners or operators under § 107(a)(2). Such owners or operators are liable under § 107(a)(2) only if they owned or operated the facility at the time of "disposal," not at the time of "release."

As noted, operator liability under § 107(a)(2) attaches to any person that operated the facility "at the time of disposal." 42 U.S.C. § 9607. If the passive migration of contaminants left by others that occurred here, and almost invariably occurs in such cases, were sufficient to satisfy this standard, then § 107(a)(2) "would be a rather complicated way of making liable all people who owned or operated a facility after the introduction of waste into the facility." *CDMG*, 96 F.3d at 715 (citing *Snediker Developers Ltd. Partnership v. Evans*, 773

F. Supp. 984, 989 (E.D. Mich. 1991); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989); *In re Diamond Reo Trucks, Inc.*, 115 B.R. 559, 565 (Bankr. W.D. Mich. 1990)). Likewise, such a reading of the statute would render § 107(a)(1), which imposes liability on the current "owner and operator" of a facility, unnecessary since such parties would always be liable under § 107(a)(2). As the Third Circuit noted in *CDMG*, "although CERCLA is not written with great clarity, [the courts] will not impute to Congress an intent to set up a simple liability scheme through a convoluted methodology." *Id.* at 715-16.

The structure of the statute also supports the conclusion that passive migration does not amount to "disposal" within the meaning of CERCLA. CERCLA provides a defense to liability in certain circumstances for "innocent owners." *See* 42 U.S.C. §§ 9607(b)(3), 9601(35). To qualify for the defense, a potentially liable party must establish that it acquired the site "after the disposal" of hazardous substances. 42 U.S.C. § 9601(35)(A). If "disposal" included the passive migration of contaminants left by others, this defense would virtually never be available. *ABB*, 120 F.3d at 358; *CDMG*, 96 F.3d at 716. "Once hazardous chemicals are in the ground, they usually spread." *ABB*, 120 F.3d at 358. If this normal migration constituted "disposal," then the innocent owner defense would be effectively eliminated since there would generally be no point "after the disposal." *ABB*, 120 F.3d at 358; *CDMG*, 96 F.3d at 716. The courts of appeals have thus refused to read "disposal" as including the passive migration of contaminants left by others, since Congress could not have intended to create a useless defense. *ABB*, 120 F.3d at 358; *CDMG*, 96 F.3d at 716.

The conclusion that the term "disposal" in § 107(a)(2) does not encompass the passive migration of contaminants left by others is supported by not only the text and structure of CERCLA, but also the underlying policy of CERCLA. One of the principal goals of Congress in enacting CERCLA was "to force polluters to pay the costs associated

with their pollution." *ABB*, 120 F.3d at 358; *CDMG*, 96 F.3d at 717. Indeed, the United States asserts that it seeks to vindicate this policy in bringing this case before the Court. But parties like Aerojet, who become involved with a previously contaminated site where existing waste spreads without their fault, cannot reasonably be called "polluters." *See ABB*, 120 F.3d at 358-59; *CDMG*, 96 F.3d 717. Nor is the waste at such a site "their pollution." The outcome in this case that would be proper under the statutory text, and also serve CERCLA's policy of forcing polluters to pay the costs associated with their pollution, is the one that the Cordova Parties have urged since the inception of this litigation. CPC should be liable under § 107(a)(2), not because it participated in managing its subsidiary, but because it directly operated facilities at a time those facilities were polluting the site owned by CPC's subsidiary. In contrast, Aerojet should not be liable because it did not operate facilities at a time of any polluting activities at the site.

C. Aerojet Did Not Operate Facilities at the Site at a Time of Disposal.

Aerojet agrees with the United States "that direct liability and derivative liability denote two analytically distinct concepts and hence require two separate inquiries." (U.S. Brief at 34). The court of appeals concluded that Aerojet cannot be held liable under § 107(a)(2) on a derivative liability theory, and the United States does not challenge that conclusion. The United States does, however, assert that Aerojet should be held liable under § 107(a)(2) on a direct liability theory, even though the district court ruling that it defends committed precisely the same error that it accuses the court of appeals of making: namely, failing to recognize the conceptual difference between direct and derivative theories of liability. The participation and control test proffered by the government and the district court is really a federalized veil-piercing standard, not an analytically distinct theory of liability.

In finding that Aerojet was directly liable under § 107(a)(2), the district court relied upon the exact same set of factors that it cited in evaluating Aerojet's derivative liability through piercing of the corporate veil under § 107(a)(1). The eleven factors cited by the district court all relate to the relationship between Aerojet and its subsidiary corporations. (Pet. App. 121a-122a, 124a) While the relationship between the parent and subsidiary corporations is the appropriate focus when determining whether the parent may be subject to derivative liability, this relationship is not the proper focus when a direct liability theory is advanced. Direct liability, as the United States repeatedly urges, must be based upon the parent corporation's own acts. Yet none of the factors cited by the district court suggests any actions by Aerojet that resulted in a disposal of hazardous substances at the facility. Aerojet's only "direct involvement with the site," according to the district court's opinion, was limited to such benign activities as supervising construction, participating in discussions regarding a possible sale of the site (including preparation of a prospectus), and leasing portions of the site to third parties after production at the site had ceased. (Pet. App. 94a.)

The United States notes the district court's finding that Aerojet was active in all aspects of its subsidiary's business at the site, including waste disposal. (U.S. Brief at 47). The United States, however, fails to put this finding in context. To the extent that Aerojet can be said to have been involved in the waste disposal practices of its subsidiary, these were *proper* waste disposal practices. The district court specifically found that: "During their period of operations, Cordova/Michigan and Cordova/California neither buried waste nor dumped it into the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras . . . . Cordova/Michigan discharged chemical waste through off-site disposal." (Pet. App. 62a) Any actions by Aerojet, then, with regard to waste disposal at the site did not relate to the disposal of hazardous substances at the facility, but rather related to proper off-site waste disposal practices. Accordingly, since Aerojet's own actions never

resulted in any disposal of hazardous substances whatsoever at the facility, it cannot be held liable under § 107(a)(2) on a direct liability theory.

IV. CPC IS DIRECTLY LIABLE UNDER CERCLA, APART FROM ITS OVERALL RELATIONSHIP WITH ITS SUBSIDIARY, BECAUSE CPC ENGAGED IN BOTH POLICY-MAKING AND DAY-TO-DAY OPERATIONS THAT CONTRIBUTED TO POLLUTION AT THE SITE.

Unlike Aerojet, CPC's own actions with regard to this facility subject it to direct liability under § 107(a)(2). The district court found that CPC actively participated in, and exerted significant control over, its subsidiary's affairs at a time when the disposal of hazardous substances was occurring at the facility.[12] (Pet. App. 110a-111a.) In particular, this participation extended to "specific policy matters including hazardous waste disposal" at the site. (Pet. App. 110a.) The district court's findings of fact provide ample support for the conclusion that CPC's own actions make it responsible as a party that operated a facility at a time of disposal of hazardous substances.

The district court found that CPC was directly involved in the environmental and regulatory affairs of its subsidiary through the work of Rick Williams, CPC's governmental and environmental affairs director. (Pet. App. 74a-75a.) Williams "actively participated in and exerted control over a variety of Ott II environmental matters." (Pet. App. 75a.) His involvement included his participation in an Ott II

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[12] CPC conceded at the court of appeals that direct liability may be imposed if the parent conducts day-to-day operations at the facility. (Supplemental Brief of CPC in the Sixth Circuit, October 30, 1995, at 14n. 5) CPC claims its conduct does not satisfy this test, but the district court made extensive findings of fact to the contrary. (Pet. App. 111a.) CPC should thus be held liable under the direct liability standard that it concedes is applicable.

meeting with officials from the state Water Resources Commission, at which he used his influence to block presentation by Ott II of its plans for a biological waste treatment facility that he considered unnecessary. (*Id.*) Williams also "instructed Ott II officials to limit cooperation with state and federal regulators regarding waste disposal and to consult with CPC before responding to regulatory questionnaires or other inquiries." (*Id.*)

This latter directive allowed CPC's Williams to carry out his policy that "delaying tactics are almost always advisable" with regard to the pollution going on at the facility. (*Id.*) In a memo to Ott II officials, Williams directed that "any unannounced visit by regulators 'should be stalled for advice from N.Y.'" and that any questionnaires "should be filled in promptly in pencil" and forwarded to CPC for "review and decision on reply." (Pet. App. 75a-76a.) Other CPC officials were also directly involved with the ongoing pollution occurring at the facility. The district court noted that Hanes Heller, a CPC attorney, negotiated with the state regarding Ott II's use of a county wastewater treatment system, provided detailed instructions to Ott II setting forth the objectives of these negotiations, and indicated that CPC's approval of any agreement was required. (Pet. App. 76a.)

The district court's findings make clear that there is a substantive difference between Aerojet's involvement with the site and that of CPC. Aerojet had no involvement, direct or indirect, with the site at any time during which the disposal of hazardous substances occurred. Aerojet's only involvement with the site was as the parent corporation of a subsidiary conducting business at the site after all of the disposal of hazardous substances had already occurred. CPC, in contrast, was directly involved in operating the site at a time of continuing disposal of hazardous substances at the site. Thus, CPC, unlike Aerojet, can be held liable under § 107(a)(2) on a direct liability theory since through its own actions it operated a facility at a time when the disposal of hazardous substances occurred.

V. EVEN IF THE CORDOVA PARTIES WERE OTHERWISE LIABLE, CERCLA'S THIRD PARTY DEFENSE MANDATES DISMISSAL OF THE CLAIMS AGAINST THE CORDOVA PARTIES.

Even if Aerojet or its subsidiaries were otherwise liable, the applicability of the third-party defense provided by § 107(b)(3) would merit dismissal of the claims against them. The Cordova Parties qualify for the third-party defense available under § 107(b)(3) of CERCLA. Section 107(b)(3) provides that:

> (b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . .
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b). Cordova/Michigan, Cordova/California, and Aerojet meet each of the requirements of this defense: (1) contamination caused solely by third parties; (2) absence of a

disqualifying contractual relationship with persons who caused contamination; and (3) exercise of reasonable conduct at the site. They are in a position similar to that of the current owner in *New York v. Lashins Arcade Co.*, 91 F.3d 353 (2d Cir. 1996), in which the Second Circuit affirmed summary judgment on the third-party defense dismissing CERCLA claims against the current owner based on contamination caused by predecessors at the site. The same result should apply in favor of the Cordova Parties.

A. Prior Owners and Operators Caused All the Contamination at the Site.

All contamination at the site was caused solely by the companies that owned and operated the site before the bankruptcy trustee succeeded by operation of law to ownership of the site in 1977.[13] Evidence of releases from unlined seepage lagoons, chemical spills, leaking drums and various other sources during operation of the facility by those prior owners is overwhelming. (Pet. App. 60a-61a.) As early as 1967, in a capital expenditure request to CPC's Board of Directors, CPC itself conceded that its Ott subsidiary was polluting the site. (Tx 418, Minutes of June, 1967, Board Meeting, p. 6 and attachment.)

In stark contrast, there is no evidence that Cordova/Michigan, Cordova/California or Aerojet caused any pollution at the site. Cordova/California and Cordova/Michigan ran environmentally sound operations. This fact is supported not only by the testimony of former and current employees of Cordova/California and Cordova/Michigan, but also by the testimony of officials for both government agencies that have made CERCLA claims against the Cordova Parties in this case. (Truchan Dep at 76; Hart Dep at 90-91, 95-102, 110-113.) The Cordova Parties simply did not cause contamination at the site.

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[13] No one has alleged that the bankruptcy trustee caused or contributed to the release or threatened release of hazardous substances at the site.

The district court's suggestion that the Cordova Parties cannot qualify for the third-party defense because of natural migration of contaminants left by CPC's former operating unit (Pet. App. 127a-128a) was explicitly rejected in *United States v. Mirabile*, 10 Chem. & Rad. Waste Lit. Rep. 661 (E.D. Pa. Sept. 4, 1985). The Mirabiles had obtained title to property at a sheriff's sale following a foreclosure. The previous owner of the property had abandoned several hundred leaking drums of hazardous waste scattered about the site. After receiving title, the Mirabiles initially did nothing about these drums but eventually moved the leaking drums to a warehouse where the drums "remained in a deteriorated and leaking condition." *Id.* at 665. The United States later removed the drums from this warehouse and sought to recover the costs of that action from the Mirabiles. The Mirabiles asserted the third-party defense. The United States moved for summary judgment rejecting the defense and argued that the Mirabiles could not claim the third-party defense because the drums continued to leak while the Mirabiles owned the property. The Court disagreed and held that "a common-sense reading of the language of the statute suggests that the defense would be potentially available to a party who can establish that he purchased property on which hazardous wastes were placed by others and that he did not add to those wastes." *Id.* The Court stated that this interpretation was supported by "the presence of principles of causation in the language of the defense . . . which are noticeably absent from the remainder of § 107." *Id.* This case is even stronger than *Mirabile* because no additional pollution entered the environment following Cordova/California's acquisition in 1977. All the contamination was already in the soil and groundwater when Cordova/California purchased the site.

Nothing in the text or logic of CERCLA suggests that natural migration of contaminants deposited by others disqualifies a person from relying on the third-party defense. Under such an interpretation, the third-party defense would be available only to those who prevented all migration of contamination during their ownership. To prevent all migration of hazardous substances already introduced into the

environment would generally require complete extraction of all contaminants from the soils and groundwater: in other words, a complete cleanup. Moreover, the complete cleanup would have to occur before the purchaser accepted title to the property. Otherwise, any migration that occurred during the remediation would preclude the purchaser's reliance on the third-party defense. If this is what Congress intended, it would have said so plainly, or simply eliminated the defense. *See Lashins Arcade*, 91 F.3d at 361 (rejecting construction of third-party defense that would require party to conduct portion of clean up to qualify for defenses).

Moreover, in this case the contaminated groundwater plume at the site had already stabilized by 1976, before any of the Cordova Parties had any contract with the site, as the trial court had determined in prior litigation involving CPC's responsibility for the contamination emanating from the site. (Tx 1573, Findings of Fact from *Gollach v. CPC Int'l, Inc.*, W.D. Mich. August 17, 1981, at ¶ 28.) The shape of the plume has not significantly changed since that time. (Tx 1989 at 2, February 7, 1983, Correspondence from CPC's counsel to U.S. EPA ("The plume is laterally stable.").) Thus, any natural migration that occurred in this case is limited to movement of water molecules through an already-defined and stationary plume. If this is enough to defeat the defense, then no one can ever qualify.

B. The Cordova Parties Did Not Have a Disqualifying Contractual Relationship With Any of the Persons Who Caused the Contamination.

None of the acts or omissions that caused contamination at the site "occur[red] in connection with a contractual relationship" between any of the persons who caused the contamination and any of the Cordova Parties. No party claims that the Cordova Parties had direct contractual relationships with CPC, Ott, Story or any other prior owner or operator that caused contamination at the site. Instead, CPC has suggested that the Cordova Parties are disqualified from relying on this

defense because of the purchase agreement between Cordova/California and the bankruptcy trustee representing Story's creditors, and because of the Stipulation and Consent Order with MDNR. (August 4, 1993 CPC Brief at 34.) CPC is mistaken. The releases of hazardous substances at the site were not "caused" by "acts or omissions" of the bankruptcy trustee and did not "occur in connection with" the Stipulation and Consent Order.

A party is not disqualified from the third-party defense merely by having a contractual relationship with a potentially liable party under CERCLA, but rather by having a contractual relationship with a party that "caused" a "release of hazardous substances." Moreover, the release itself must have "occur[red] in connection with" the disqualifying contractual relationship for the protections of the third-party defenses to be lost. *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 964 F.2d 85, 89 (2d Cir. 1992) ("a landowner is precluded from raising the third-party defense only if the contract [with a party that caused the releases] somehow is connected with the handling of hazardous substances."); *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1543 (E.D. Cal. 1992); *United States v. A&N Cleaners and Launderers, Inc.*, 842 F. Supp. 1543 (S.D.N.Y. 1994). Even the cases on which CPC has relied illustrate the point. In *In re Sterling Steel Treating, Inc.*, 94 B.R. 924 (Bankr. E.D. Mich. 1989), the court found only that the bankruptcy *estate* was a potentially responsible party under § 107(a)(1) as the site's current owner and operator. The court made no finding at all regarding the potential liability of the bankruptcy *trustee*, much less that the bankruptcy trustee somehow caused a release of hazardous substances and thus disqualified a subsequent purchaser from relying on the third-party defense.[14] Likewise, in *City of Phoenix, Ariz. v. Garbage Services Co.*, 816 F.

[14]Contrary to CPC's statement below, *Sterling Steel* did *not* reject a purchaser's assertion of the third-party defense based on a contractual relationship with the trustee. The bankruptcy court does not even discuss the issue in rejecting the defense on other grounds. *Sterling Steel*, 94 B.R. at 928-30.

Supp.. 564, 568 (D. Ariz. 1993) the court found only that a trustee holding title was liable under CERCLA § 107(a)(1) as the site's current owner. Once again, the court did not even address the cause of contamination. No party has alleged that the bankruptcy trustee in this case actually caused contamination at the site. Accordingly, the purchase agreement is not a contractual relationship in connection with any conduct that caused the site's contamination.

Likewise, the Stipulation and Consent Order with MDNR does not disqualify the Cordova Parties from the third-party defense. *United States v. Hooker Chemical & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988), cited by the MDNR below, actually supports the Cordova Parties' position that no disqualifying contractual relationship existed. In *Hooker Chemical*, Occidental Chemical Company deposited 42 million pounds of chemicals that eventually contaminated Love Canal. Occidental asserted the third-party defense, claiming that the chemicals were secure when it sold the site. The court rejected the defense because Occidental had a continuing contractual relationship with those who actually caused the contamination and had retained the ability to control their actions. *Id.* at 558. In contrast, none of the Cordova Parties had the ability to control the action of any of the parties that caused the contamination at the site. Moreover, any releases of hazardous substances attributable to MDNR's inaction did not "occur in connection with" the Stipulation and Consent Order. *See* 42 U.S.C. § 9607(b)(3). It would be incongruous indeed if a release from liability given by a state stripped the recipient of statutory protection that would otherwise protect it from liability for pollution caused by others.

C. The Cordova Parties Acted Reasonably by Conducting Environmentally Sound Operations and by Relying on the Promises Made by MDNR in the Stipulation and Consent Order.

The Cordova Parties acted reasonably in responding to contamination at the site. Before agreeing to purchase the property,

Cordova/California reached an agreement with the State of Michigan and MDNR that addressed all the environmental problems at the site and assigned responsibility for abatement and remedial actions. (Tx 1019, Consent Order; Swanson Dep at 57-59.) Cordova/California satisfied its obligations under the agreement by removing phosgene which had been left on site and by providing the agreed-upon funds to the State of Michigan. (Tx 1053, January 4, 1978, correspondence from MDNR; Tx 1064, February 16, 1978, correspondence to Hogarth; Tx 1130, correspondence to MDNR and canceled checks). Cordova/ California also removed contaminated sludge left in the equalization basin by the previous owners. (Pet. App. 62a.) Cordova/Michigan disposed of abandoned drums that the State failed to remove. It also demolished and disposed of contaminated buildings and equipment left by the previous owners before commencing any operations at the site. (R:187 at Exhibit Q, Response to CPC's Interrogatories at 41; Tx 1364, Peden Affidavit, ¶ 5.) All of these actions were taken with due care and in the interest of improving the environmental condition of the site.

Similarly, the Cordova Parties' reliance on MDNR to address groundwater contamination at the site was, and is, reasonable and consistent with the exercise of due care. It would be incongruous, to say the least, if the Cordova Parties' reliance on the department of state government charged with responsibility for protecting Michigan's natural resources were found to be so unreasonable as a matter of law to preclude application of the third-party defense. Like other proffered interpretations of the statute, this attempt to defeat the third-party defense ultimately comes down to the proposition that the defense protects only those who voluntarily assume the liability from which the defense supposedly protects them. For reasons already recited, that is not and cannot be the law.

CPC has also suggested in earlier briefing that the Cordova Parties' failure to operate the Ott "purge system" was unreasonable and that the migration of hazardous substances was unchecked during the Cordova era. The accusations are unfounded. The so-called Ott "purge

system" was nothing but a mirage. After a thorough consideration of the evidence, the district court concluded that the Ott purge system had simply not been effective to stop the spread of contaminants. (R:532, July 22, 1992, Opinion Denying Motion to Amend and Denying Motion to Reopen the Record at 7) ("the wells were operated intermittently and . . . they were not sufficiently effective to check the underground spread of contamination.").) Moreover, the purge system no longer existed by the time any of the Cordova Parties had contact with the site. (R:390, Peterson, Tr at 486 (the purge system had already been largely dismantled).) The record does not support this "unchecked migration" theory. By the time the Cordova Parties first came to the site, the plume of contaminants had already migrated off site as far as it ever would go. (Tx 1573, Findings of Fact from *Gollach* litigation; Tx 1989, February 7, 1983, letter to U.S. EPA at 2; Truchan Dep. at 239-40.) In fact, CPC itself has repeatedly argued to federal regulators that purging at the site is unnecessary and that the contamination problems at the site have not worsened due to any migration. (R:333, UF at ¶ 235; Tx 1858, July 22, 1981, letter to MDNR; Tx 1860, July 29, 1981, letter to Tanner; Tx 1864, October 13, 1981, letter to U.S. EPA; Tx 1989, February 7, 1983, letter to U.S. EPA; Tx 2402, November 7, 1986, letter to U.S. EPA.) The Cordova Parties' "failure" to reconstruct and use a "system" that never worked in the first place is not unreasonable.

The Cordova Parties have taken precautions against foreseeable acts or omissions by third parties. The language of this final element of the § 107(b)(3) defense indicates that it applies exclusively to prospective conduct of third parties: conduct that has already occurred cannot be "foreseeable". Accordingly, the requirement has no real application to a case like this one, in which all existing contamination occurred before Cordova/California acquired the site. *Cf. United States v. Sharon Steel,* 1988 U.S. Dist. LEXIS 11975 (D. Utah July 13, 1988) (omitting any discussion of the requirement in a case involving contamination already caused by previous owners or operators); *State of Washington v. Time Oil Co.*, 687 F. Supp. 529, 533 (W.D. Wash. 1988)

(merging the requirement into the "due care" requirement). Furthermore, Cordova/California took "precautions" with regard to the existing contamination by entering into a Consent Order with MDNR to allocate responsibility for the abatement and remediation of the contamination problems and by removing all actual and potential sources of contamination to which such an outside party might obtain access, such as phosgene and barrels of chemicals.

There should be no question but that Cordova/California and Cordova/Michigan acted reasonably with respect to the environmental contamination at the site and that the Cordova Parties are entitled to the benefit of the § 107(b)(3) defense. If there is any question remaining, then the issue should be remanded for consideration by the lower courts.

CONCLUSION

The court of appeals correctly drew a sharp analytical distinction between derivative liability under the applicable corporate law of veil piercing and direct statutory liability under § 107(a)(2). The district court's and the government's proffered "participation and control" theory ignores the statutory text and necessarily leads to improper development of a federal common law of veil piercing in CERCLA cases. Accordingly, this Court should reject the "participation and control" test and confine direct CERCLA liability under § 107(a)(2) to the words of the statute itself. Under § 107(a)(2), none of the Cordova Parties can be liable because none operated facilities at a time of new disposal. CPC, however, can and should be directly liable under § 107(a)(2) for its own conduct at the Site based on the facts found by the district court.

Even if this Court adopts the "participation and control" test proffered by the government, it should not reverse the court of appeals' judgment as to the Cordova Parties. It should either affirm the judgment on the alternate grounds of the third party defense and the

proper definition of "disposal" under CERCLA, or in the alternative, remand for plenary consideration of these issues in the lower courts.

Respectfully submitted,

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